IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 75 of 1982

For Approval and Signature:

Hon'ble MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgement? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

KHAVAS LAXMAN GAGU

Versus

GULABKUNVERBA AURVEDIC SOCIETY

Appearance:

MR SURESH M SHAH,

with Mr.Mehul S. Shah, for Petitioner

MR AR THAKKAR for the Respondent.

CORAM : MR.JUSTICE P.B.MAJMUDAR

Date of decision: 08/05/2000

ORAL JUDGEMENT

1. This Revision Application is directed against the judgment and order passed by the learned Assistant Judge, Jamnagar in Regular Civil Appeal No.5 of 1981. The petitioner herein is the original defendant, against whom the respondent filed a suit, being Civil Suit No.444 of 1974, in the Court of learned Joint Civil Judge (J.D.), Jamnagar.

2. It is the case of the plaintiff that the

plaintiff is a Society. The suit property was given on rent to the defendant tenant at the rate of Rs.10/- per month, that the defendant had not paid rent for a long time and he was in arrears from 1.8.1968 and, therefore, demand notice was given to him on 8.7.1974. In spite of the same, the defendant had not complied with the same. Therefore, the aforesaid suit was filed for getting decree for eviction on the ground of arrears of rent. In addition to the aforesaid ground, other grounds were also raised, i.e., acquisition of alternative premises by the tenant, non-user by the tenant and change of user of the suit premises. Ultimately, therefore, decree for possession was sought for on the aforesaid grounds.

3. The defendant appeared in the suit and filed his written statement Exhibit 14. The defendant denied the fact about receiving any notice of demand. According to him, he was ready and willing to pay the rent and that one Manubhai Patel used to manage the suit property and used to collect the rent from the defendant. That the defendant had gone to him with the arrears of rent, but he refused to accept the same. According to him, therefore, he cannot be said to be in arrears of rent. The defendant also denied the case of non-user or acquisition of any alternative accommodation.

4. The learned trial Judge framed various issues at Exhibit 15. After considering the evidence, the trial court came to the conclusion that the suit notice was not served on the defendant and, therefore, the plaintiff was not entitled to decree for possession on the ground of arrears of rent. He also negatived other grounds on which the decree for eviction was sought, i.e., non-user or acquisition of alternative accommodation. The trial court fixed the standard rent at Rs.10/- per month. Ultimately, on the aforesaid finding, the suit for possession was dismissed by the trial court.

5. Being aggrieved by the aforesaid decree of the trial court, the original plaintiff preferred an appeal, being Regular Civil Appeal No.5 of 1981. The aforesaid appeal was heard by the Assistant Judge, Jamnagar, who allowed the same and suit for possession was decreed on the ground of arrears of rent. The original tenant-defendant has challenged the decree of the appellate court in the present revision application.

6. At the time of hearing of this Revision, it was argued by Mr.S.M. Shah on behalf of the petitioner that notice under Section 12(2) was not served on the defendant and, therefore, decree for possession cannot be

passed on the ground of arrears of rent. It was argued by Mr.Shah that the trial court, before whom the witness was in witness box, has considered the evidence of the defendant and has come to the conclusion that the statement of the defendant in his evidence that he has received the suit notice by ordinary post was merely a slip of tongue and, therefore, the appellate court should not have re-appreciated that evidence because there was no occasion to the learned Appellate Judge to know the demeanour of the said witness and, therefore, such finding of fact was not required to be interfered with by the appellate court. It was also argued by him that in any case, looking to the evidence on record, it is presumed that the tenant was ready and willing to pay the rent.

7. Mr.Thakkar for the other side has argued that the suit notice was served on the defendant-tenant, both by way of registered post as well as by way of certificate of posting and the endorsement `unclaimed' on the registered A.D. slip is presumed to have been valid service. He also further argued that service of notice under certificate of posting is also a valid service and that in view of the admission of the defendant that he has received the said not....

of service is not relevant. He also further argued that the tenant has admitted in evidence that he is not using the suit property as he is residing in other premises and in that view of the matter, the revision application deserves to be dismissed.

8. The crucial question, which requires consideration, is whether notice of demand as contemplated under Section 12(2) of the Act was really served on the defendant-tenant or not. Section 12(2) of the Rent Act provides as under :-

> "12. No ejectment ordinarily to be made if tenant pays or is ready and willing to pay standard rent and permitted increases.-
>
> (1) xxx xxx xxx
>
> (2) No suit for recovery of possession shall be instituted by a landlord against a tenant on the ground of non-payment of this standard rent or permitted increases due, until the expiration of one month next after notice in writing of the demand of the standard rent or permitted increases has been served upon the tenant in the

manner provided in Section 106 of the Transfer of Property Act, 1882 (IV of 1882). "

The notice for demanding rent is at Exhibit 20. There is no reply to the suit notice. However, in the written statement, the defendant has stated that he has not received the notice either by registered post or by ordinary post under certificate of posting. Though, of course, the learned trial Judge has not raised any specific issue about service of notice, the parties have led evidence on the aforesaid question and in view of the aforesaid evidence on record, the trial court has decided the said point. The plaintiff has served the said notice by registered post as well as by ordinary post under certificate of posting. Over and above the same, the notice was also served by affixing the same on the suit premises. The trial court as well as the appellate court has not believed the say of the plaintiff about service by affixing. In that view of the matter, this Court, sitting in Revision, cannot re-appreciate that evidence as both the courts have not believed the say of the plaintiff that there was any service of notice by the ....

discarded, then there are two other modes of service, i.e. service by registered post and also by ordinary post under certificate of posting. Exhibit 19 shows that the suit notice was served by registered post A.D. There is an endorsement of the postman on Exhibit 19 that the notice was not claimed by the addressee. The endorsement on Exhibit 19 reads :-

"Not claimed. Returned to the sender."

Similarly, the postal certificate, under which the notice was served by ordinary post, is also produced at Exhibit 21. Exhibit 21 bears the postal stamp dated 8.4.1974. So far as the endorsement "not claimed" is concerned, it is argued by Mr.Shah that the aforesaid endorsement would show that the notice is not received by the tenant. According to him, endorsement "not claimed" cannot be equated with "refusal". He also further argued that even notice by ordinary post under certificate of posting is not a valid notice. To substantiate his say, he has relied upon the judgment of this Court in Mahant Madhavramji Durgaramji v. Ambalal Nagarji Naik, 1985 G.L.H. 361. This Court (Coram : J.P. Desai, J.) in the aforesaid case, has taken the view that service by ordinary post is not a valid service and that there should be a notice by way of registered post. The

learned single Judge has considered the provisions of Section 12(2) of the Rent Act, along with Section 106 of the Transfer of Property Act and Section 27 of the General Clauses Act, 1897. Ultimately, it was found that sending of notice by ordinary post under certificate of posting is not a legal and valid service as required by Section 12(2) of the Act. In the facts of that case, the other mode of service by registered post also came back, with an endorsement "not claimed". Ultimately, therefore, it was found that there was no valid service on the tenant.

9. Mr.Shah has further relied upon a judgment of this Court in the case of Bai Bachiben Velabhai v. State of Gujarat & Anr., 36(1) G.L.R. 761 (Coram : A.N. Divecha, J.). This Court found that the endorsement `unclaimed' on a letter sent by registered post cannot justify inference that the addressee has refused to accept the letter. The aforesaid case arose out of the proceedings under the Urban Land (Ceiling and Regulation) Act, 1976. The draft statement prepared by the Competent Authority was served on the holder of land. The aforesaid envelope, containing the draft statement, was despatched at the address of the owner of the land by post under registered cover and it came back with the postal endorsement `unclaimed'. The Department construed the aforesaid endorsement as `refused'. In the background of the aforesaid facts, this Court, in the aforesaid judgment, took the view that the endorsement `unclaimed' could not have been treated as `refusal' by the authority.

10. Relying upon the aforesaid judgments, it was argued by Mr.Shah that service by ordinary post through certificate of posting cannot be said to be a valid service and the endorsement "not claimed" also cannot be treated as a valid service on the t....

him, therefore, this Court should presume that there was no valid service on the tenant and in absence of any valid service, the suit for recovery of rent was not maintainable.

11. As against that, Mr.Thakkar for the respondent has argued that so far as the endorsement "not claimed" is concerned, the same should be treated as 'refusal' by the tenant to accept notice and it should be presumed that the notice was served on him. Mr.Thakkar has relied upon the judgment of the Supreme Court in M/s. Madan and Co. v. Wazir Jaivir Chand, AIR 1989 SC 630. The Honourable Supreme Court has observed in paragraph 6 as

under :-

> "... 6. We are of opinion that the conclusion arrived at by the Courts below is correct and should be upheld. It is true that the proviso to Cl.(i) of S.11(1) and the proviso to S.12(3) are intended for the protection of the tenant. Nevertheless it will be easy to see that too strict and literal a compliance of their language would be impractical and unworkable. The proviso insists that before any amount of rent can be said to be in arrears, a notice has to be served through post. All that a landlord can do to comply with this provision is to post a prepaid registered letter (acknowledgment due or otherwise) containing the tenant's correct address. Once he does this and the letter is delivered to the post office, he has no control over it. It is then presumed to have been delivered to the addressee under S.27 of the General Clauses Act. Under the rules of the post office, the letter is to be delivered to the addressee or a person authorized by him. Such a person may either accept the letter or decline to accept it. In either case, there is no difficulty, for the acceptance or refusal can be treated as a service on, and receipt by, the addressee. The difficulty is where the postman calls at the address mentioned and is unable to contact the addressee or a person authorized to receive the letter. All that he can then do is to return it to the sender. The Indian Post Office Rules do not prescribed any detailed procedure regarding the delivery of such registered letters. When the postman is unable to deliver it on his first visit, the general practice is for the postman to attempt to deliver it on the next one or two days also before returning it to the sender. However, he has neither the power nor the time to make enquiries regarding the whereabouts of the addressee; he is not expected to detain the letter until the addressee chooses to return and accept it; and he is not authorized to affix the letter on the premises because of the assessee's absence. His responsibilities

cannot, therefore, be equated to those of a process server entrusted with the responsibilities of serving the summons of a Court under O. V of the C.P.C. The statutory provision has to be interpreted in the context of this difficulty and in the light of the very limited role that the post office can play in such a task. If we interpret the provision as requiring that the letter must have been actually delivered to the addressee, we would be virtually rendering it a dead letter. The letter cannot be served where, as in this case, the tenant is away from the premises for some considerable time. Also, as addressee can easily avoid receiving the letter addressed to him without specifically refusing to receive it. He can so manipulate matters that it gets returned to the sender with vague endorsements such as "not found", "not in station", "addressee has left" and so on. It is suggested that a landlord, knowing that the tenant is away from station for some reasons, could go through the motions of posting a letter to him which he knows will not be served. Such a possibility cannot be excluded. But, as against this, if a registered letter addressed to a person at his residential address does not get served in the normal course and is returned, it can only be attributed to the addressee's own conduct. If he is staying in the premises, there is no reason why it should not be served on him. If he is compelled to be away for some time, all that he has to do is to leave necessary instructions with the postal authorities either to detain the letters addressed to him for some time until he returns or to forward them to the address where he has gone, or to deliver them to some other person authorized by him. In this situation, we have to choose the more reasonable, effective, equitable and practical interpretation and that would be to read the word "served" as "sent by post", correctly and properly addressed to the tenant, and the word "receipt" as the tender of the letter by the postal peon at the address mentioned in the letter. No

> other interpretation, we think, will fit the situation as it is simply not possible for a landlord to ensure that a registered letter sent by him gets served on, or is received by, the tenant .... "

Mr.Thakkar, therefore, has argued that the fact that the notice was not claimed by the tenant should be presumed to be `refusal' on his part.

12. Mr.Thakkar has also relied upon the judgment of the Honourable Supreme Court in Union of India v. Kishan Chand and others, (1996) 11 SCC 523. In the said case, the notice to the respondent Nos. 2, 3, and 4 to 20 returned with postal remarks "Address Incomplete". The Honourable Supreme Court came to the conclusion that notice must be presumed to have been served on them. Mr.Thakkar has also relied upon the judgment of the Honourable ....

CCCCCCCCCCCCCC CCCCCCCC Vaidhyan Balan and another, (1999) 7 SCC 510. The aforesaid case was under Section 138 of the Negotiable Instruments Act. Notice to drawer returned as `unclaimed'. Considering the provisions of Section 27 of the General Clauses Act, 1897, it was found that where sender has despatched notice by post with correct address written thereon, such notice can be deemed to have been served on addressee unless he proves that he was never actually served and that he was not responsible for the non-service. In paragraph 23 of the said judgment, it was found by the Supreme Court as under :-

> "... 23. Here the notice is returned as unclaimed and not as refused. Will there be any significant difference between the two so far as the presumption of service is concerned? In this connection a reference to Section 27 of the General Clauses Act will be useful. The section reads thus :
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> "27. Meaning of service by post.-Where any Central Act or Regulation made after the commencement of this Act authorises or requires any document to be served by post, whether the expression `serve' or either of the expressions `give' or `send' or any other expression is used, then,

> unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."
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> xxx xxx xxx "

13. Mr.Thakkar has also relied upon the judgment of the Honourable Supreme Court in the case of State of Kerala and others v. T.K. Udaya Sankaran and others, 1995 Supp. (3) SCC 518. In the said judgment, when the service of notice was sought to be effected on respondents 1 and 2, postal endorsement showed "not known". It was found by the Honourable Supreme Court that they appeared to have managed to have the notice returned with the endorsement so as to delay the proceedings and, therefore, the notice must be deemed to have been served on them.

14. It is no doubt true that this Court in Bai Bachiben Velabhai v. State of Gujarat & Anr., 36(1) G.L.R. 761 (Coram : A.N. Divecha, J.) (supra) has taken a view that endorsement "not claimed" cannot be treated as valid service. However, as per the judgment of the Honourable Supreme Court in M/s. Madan and Co. v. Wazir Jaivir Chand, AIR 1989 SC 630, which is under J & K Houses and Shops Rent Control Act, has found that if a registered letter addressed to a person at his residential address does not get served in the normal course and is returned, it can only be attributed to the addressee's own conduct if he is staying in the premises. In view of the aforesaid proposition of law laid down by the Honourable Supreme Court, prima facie, it is not possible to agree with the view taken by the learned Single Judge of this Court about the endorsement "not claimed" is concerned. However, since this revision application can be disposed of on other points, it is not necessary to consider the request of the counsel for the petitioner for referring this matter to a Division Bench. Therefore, it is not necessary for me to examine the aforesaid question in detail. In an appropriate case, the same may be required to be considered whether the view taken by the single Judge of this Court is required to be reconsidered in view of the subsequent judgments of the Honourable Supreme Court.

15. Similar is the position so far as service by ordinary post through certificate of posting is concerned. A learned single Judge of this Court (Coram : J.P. Desai, J.) in Mahant Madhavramji Durgaramji v. Ambalal Nagarji Naik, 1985 G.L.H. 361 has taken the view that the same cannot be said to be a valid service as it is not through registered post. Similar view is also taken by this Court in Oza Kumbhar Naran Ala v. Mehta Nanalal Jethabhai, 28(1) G.L.R. 473 (Coram : R.A. Mehta, J.) that notice sent under certificate of posting

the learned Single Judges of this Court, service through registered post is a valid service and not by ordinary post through certificate of posting. However, Mr.Thakkar has relied upon the judgment of this Court in M/s. Nazarali Noorbhai & Sons and others v. Shri Abdulhussain Hakimji Godwala, 1980 Bom. R.C. 13. This Court has taken the view that considering Section 12(2) of the Bombay Rent Act and Section 106 of the T.P. Act, sending the notice by post under certificate of posting is a valid service. This Court has considered the provisions of Section 106 of the T.P. Act, which reads as under :-

> " Every notice under this section must be in writing signed by or on behalf of the person giving it, and either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party, or to one of his family or servants at his residence, or (if such tender of delivery is not practicable) affixed to a conspicuous part of the property."

Relying upon the said judgment, it was argued by Mr. Thakkar that Section 106 of the T.P. Act nowhere states that such notice must be served through registered post and what is required is sending of notice by post. It was argued by him that sending notice by ordinary post is also one of the modes of service as contemplated by Section 106 of the T.P. Act. It is no doubt true that there is nothing in Section 106 of the T.P. Act, contemplating notice only through registered post. However, in view of conflicting views of this Court, i.e. the view taken by the two learned single Judges reported in 1985 G.L.H. 361 (supra) and 36(1) G.L.R. 761 (supra), and in view of the aforesaid decision of another learned single Judge in 1980 Bom. R.C. 13 (supra), I refrain myself from expressing any final opinion on this point, as, in the facts of the case, it is not necessary

to go into these wider questions, i.e. whether endorsement `unclaimed' can be said to be `refusal' of notice or sending notice by ordinary post can be said to be a valid mode of service as contemplated by Section 106 of the T.P. Act. The facts of the instant case make it clear that the tenant was subjected to service of suit notice and, therefore, whether it was by a particular mode is not relevant. In this connection, the learned appellate Judge has considered the evidence of the defendant in paragraph 9 of his judgment. The defendant has stated in his evidence in cross-examination at Exhibit 32 that he received the notice by ordinary post sent to him under certificate of posting. Thereafter, having realised his mistake that such admission on his part may destroy his case regarding the theory of non-receipt of suit notice, he stated that he did not recollect or remember whether he received any such notice. The aforesaid piece of evidence was considered by the appellate Judge in coming to the conclusion that the tenant can be said to have received the suit notice in view of his admission in the cross-examination. The trial court, of course, found that the same was merely a slip of tongue. However, it is pertinent to note that the tenant has not stated anything thereafter even by re-examination that, by mistake, any such such statement was made. The tenant has also not said that he had not received any such notice worth the name at any point of time. He has merely stated that he did not remember whether such notice was received by him or not. It is pertinent to note that in cross-examination, he did not specifically deny the fact about receipt of suit notice by ordinary post. The learned appellate Judge, therefore, on appreciating that piece of evidence, has come to the conclusion that the tenant has received the suit notice by ordinary post under certificate of posting. Mr.Shah, however, argued that the appellate Judge should not have disturbed the finding of the trial court, wherein the trial court was of the opinion that this was merely a slip of tongue. I do not agree with the said submission of the learned Advocate of the petitioner. The first appellate Court is the final court so far as appreciation of evidence is concerned as well as recording of finding of fact is concerned. The power of the appellate court is not in any way curtailed in the matter of appreciating the evidence and considering the evidence on record. If the appellate court has come to the conclusion that the suit notice was received by the tenant, it cannot be said that the said finding is either perverse or not as per the evidence on record. Therefore, assuming that the service by way of registered post A.D., which came back with the endorsement of "not

claimed", cannot be said to be valid service, then also in view of the aforesaid fact about tenant's own say that he has received the demand notice, by ordinary post, is sufficient to hold that the suit notice was served on the tenant.

16. Learned Advocate Mr.Shah has relied upon the judgment in Chikkam Koteswara Rao v. Chikkam Subbarao and others, AIR 1971 SC 1542, to the effect that admissions must be clear in their meaning and that there should not be any doubt or ambiguity. However, in the instant case, it has been found by the appellate Judge that the notice by ordinary post was sent under certificate of posting and, therefore, there would be a presumption of posting of such notice and the postal authority must have followed the ordinary course of business by sending the said letter to the addressee. Considering the aforesaid aspect, the aforesaid evidence of the defendant in cross-examination has been considered by the appellate court and, thereafter, the appellate court has come to the conclusion that the tenant has received the suit notice. In that view of the matter, I do not find any error in appreciating the evidence on the part of the defendant for coming to the conclusion about receipt of suit notice by the tenant. I, therefore, do not find any substance in the argument of Mr.Shah on the first point that the suit notice was not served on the defendant-tenant. It is not the say of Mr.Shah that even if the notice is not served by any of the recognized modes and if the tenant has received the same, then also, it should not be considered to be a valid service or that even if the tenant has received such notice, no effect should be given to it. The basic principle for sending notice to the tenant is to put to his notice or knowledge that he is in arrears of rent and that he should pay such arrears within the stipulated time. In the instant case, the tenant has already been sent notice in all possible modes of service, i.e. by registered post, under certificate of posting and even by affixing. Of course, that part was not believed by the court below. However, the learned appellate Judge has rightly believed the service which the tenant has received, i.e. by way of certificate of posting. The aforesaid finding of the appellate court, therefore, deserves to be upheld and, I, therefore, reject the contentions made by Mr.Shah on the aforesaid point. If it is believed that the suit notice is served on the defendant, then it is not in dispute that the tenant has not sent any amount within one month from the receipt of the suit notice, nor has he raised any dispute of standard rent within one month. In that view of the matter, decree under Section 12(3)(a) is

required to be passed as laid down by this Court in Arjun Khiamal Makhijani v. Jamnadas C. Tuliani & Ors., 31(1) G.L.R. 209. The Honourable Supreme Court has held that if the rent is payable by month and no dispute of standard rent is raised within one month, the case falls under Section 12(3)(a) of the Rent Act and in that case, there is no alternative, but to pass a decree for eviction. In that view of the matter, the learned appellate Court was absolutely justified in decreeing the suit of the plaintiff on the ground of arrears of rent.

17. Mr.Thakkar for the respondent has submitted that the tenant is also not residing in the suit property and that he has acquired another alternative suitable residence. According to him, it is nothing but misusing the provisions of the Rent Act by the tenant by not gracefully handing over the possession to the landlord even after acquiring his own premises. Both the courts have considered the aforesaid aspect, but it is rightly found that since there is no evidence when the tenant has acquired alternative accommodation, whether before taking this property on rental basis or thereafter, and in absence of satisfactory evidence regarding the time when such acquisition was made by the tenant, the aforesaid point was rightly negatived by the courts below. Mr.Thakkar thereafter has argued that the tenant has admitted in his evidence that he is not using the suit property. It is true that the tenant has said in his evidence that he is residing in the premises of one Mr.K.P. Thakore and that he is not the owner of the suit premises. It is no doubt true that the tenant has said that he is residing elsewhere, but it is not possible, in absence of cogent evidence about non-user, to come to the conclusion that the tenant is not using the suit premises. However, in view of what is stated above, on the ground of non-payment of arrears of rent, the order of the appellate court deserves to be upheld. The revision application is accordingly required to be rejected. I, therefore, do not find any merit in this Civil Revision Application. The Revision deserves to be dismissed and it is accordingly dismissed. Rule is discharged. Interim relief stands vacated. No order as to costs.

18. At this stage, Mr.Shah for the petitioner has requested for granting some time for approaching the Honourable Supreme Court against the judgment of this Court.

19. Mr.Thakkar, however, argued that since the tenant is not using the suit property at all and it is kept

closed, no time should be given to the petitioner for the aforesaid purpose, as, according to him, the tenant is interested only in keeping the premises closed, with some ulterior motive. However, this revision application is of 1982 and since its admission, interim relief is in force. I, therefore, deem it fit to continue the interim relief granted by this Court for a period of two months from today. The interim relief granted by this Court against the execution of the decree for possession is ordered to be continued upto 15th July, 2000 to enable the petitioner to take further recourse to law.

8th May, 2000 (P.B. Majmudar, J.)

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(apj)